

The Commission stresses that there are two factual issues that form the basis for the conclusions. Complainant Boyd was evicted from her housing by Respondent Primack, based on her gender identity and expression. (*See* Hearing Examiner’s Findings of Fact 22 and 24). In addition, Respondent Primack sent discriminatory harassing text messages to Complainant Boyd. (*See* Hearing Examiner’s Findings of Fact 25 -27).

II. CONCLUSIONS OF LAW

A. Jurisdiction

The Commission adopts and incorporates Conclusion of Law A, that the Commission has jurisdiction over this case under Chapter 515 of the Hawai’i Revised Statutes.

Further, the Commission holds that Respondent Primack was afforded due process of law in connection with the hearing in this case. Respondent was notified of all hearing dates, by mail sent to his last known address, and by electronic mail. Respondent Primack participated in the hearing process throughout the case. He chose not to attend the Motions Hearing held on June 20, 2018 and the Final Hearing held on June 27, 2018. Respondent Primack filed a Motion on February 20, 2018 asking for telephonic participation in the scheduling Conference. He was granted leave to attend the Scheduling Conference telephonically, and did so on February 23, 2018, at which time the parties together agreed upon dates for the motions hearing and the final hearing. On May 29, 2018, Respondent appeared telephonically for a settlement conference.

As described in the Hearing Examiner’s June 25, 2018 Order Denying Respondent Jeffrey Primack’s Requests Received Via Electronic Mail on June 25, 2018, Respondent, on that date, sent an electronic mail to the Hearing Examiner stating, “You will have me by telephone on 6/27/2018 at 9am,” and listing two witnesses who would also appear telephonically. Respondent

had not previously submitted a timely motion requesting telephonic participation, which motion would have been due no later than May 30, 2018, nor had he submitted a witness list, which would have been due no later than May 23, 2018. Deadlines were listed in the Scheduling Conference Order issued on February 23, 2018. As noted above, respondent Primack attended the Scheduling Conference telephonically, on February 23, 2018. The June 25, 2018 Order Denying Respondent Jeffrey Primack's Requests Received Via Electronic Mail on June 25, 2018 outlines the multiple reasons for denial of the late requests.

The Respondent received both the Hearings Examiner's Decision and the Hearing Examiner's Amended Decision, which were sent by certified mail, on August 13, 2018 and August 22, 2018 respectively.

B. Sex Discrimination on the Basis of Sex, Including Gender Identity and Expression, in a Real Estate Transaction

The Commission adopts and incorporates Conclusion of Law B, which concludes that Respondent Primack violated H.R.S. §515-3 (1) and H.A.R. § 12-46-305 (1), which provide that it is a discriminatory practice for an owner or any other person engaging in a real estate transaction to discriminate against a person in the terms, conditions or privileges of a real estate transaction because of sex, including gender identity and expression. Under H.A.R. §§12-46-305(2) and (9), it is a discriminatory practice for an owner in a real estate transaction to discriminate in the terms, conditions, or privileges of a real estate transaction or in the furnishing of services in connection therewith because of a person's protected status, or to engage in harassment against a person based on their protected status. Respondent's action in forcing Complainant Boyd to leave the subject property are in violation of these sections. Pursuant to

H.R.S. §515-17 and H.A.R. §12-46-311, it is also a discriminatory practice to attempt to commit, directly or indirectly, a discriminatory practice.

C. Direct Evidence of Discriminatory Intent

The Commission also adopts and incorporates Conclusion of Law C, that Respondent:

1. Made discriminatory statements, including verbal statements and electronic messages. Such statements are considered direct evidence of discrimination, Exhibits 1-11;
2. Interfered with Complainant's enjoyment of her housing accommodation;
3. Refused to engage in a real estate transaction, and asked Complainant to leave the property because of her gender identity and expression;
4. Created a hostile housing environment.

The Commission has previously ruled that a question of whether a housing provider has created an actionable hostile housing environment should be based on the same six elements set applied in the employment discrimination context. *William D. Hoshijo, on behalf of the complaint filed by Elaine M. Bowes vs. Michael Kakar*, Docket No. 09-001-H-SH (HCRC 2010).

Accordingly, to establish a hostile housing environment claim, the claimant must show that: 1) complainant was subjected to sexual advances, requests for sexual favors, or other verbal or physical conduct or visual forms of harassment of a sexual nature; 2) the conduct was unwelcome; 3) the conduct was severe or pervasive; 4) the conduct had the purpose or effect of either (a) unreasonably interfering with the complainant's use or enjoyment of the premises, or (b) creating an intimidating, hostile or offensive environment; 5) the complainant actually perceived the conduct as having such purpose or effect; and 6) the complainant's perception was

objectively reasonable to a person of the complainant's gender in the same position as the complainant. *Id.* at 7-8, citing *Arquero v. Hilton Hawaiian Village LLC*, 104 Hawai'i 423, 428 (2004);

In this case, the Hearings Examiner concluded that Respondent's conduct established all these elements, and we affirm. Respondent's conduct was in violation of HRS § 515-16(3),(6),(7), and HAR § 12-46-310(6), by making discriminatory verbal statements, and by sending text messages, including threats of violence, to the Complaining Party. Mr. Primack's actions constituted threatening, intimidating, and interfering with Kiona Boyd's housing accommodation because of Ms. Boyd's gender identity and expression.

III. LIABILITY

The Commission concurs with the Hearings Examiner's Decision and concludes that Respondent Primack engaged in sex discrimination against Complainant Boyd in violation of H.R.S. §§515-3, 515-16 and H.A.R. §§12-46-305, 12-46-310 and 12-46-311.

IV. REMEDIES

A. Compensatory Damages

Under H.R.S. §§515-13(b)(7) and 368-17(a) the Commission has the authority to award compensatory damages for any pain, suffering, embarrassment, humiliation or emotional distress Complainant suffered as a result of Respondent's discriminatory acts. The Hawai'i Supreme Court has held, "The Commission and the Courts clearly have the power to award compensatory damages, including damages for emotional distress[.]" *Furukawa v. Honolulu Zoological Soc.*, 85 Hawai'i 7, 11, 936 P.2d 643, 647 (1997). The Court explained the basis for its holding:

In *Ross*, this court assumed, for the sake of argument, "that HRS § 368-17(a) permits a court to award compensatory and punitive

damages in civil actions brought under Part I of HRS Chapter 378.” 76 Hawai‘i at 463, 879 P.2d at 1046. That question is now squarely presented.

The Commission provides the mechanism for enforcement of discrimination law in Hawai‘i. *See* HRS Chapter 368; HRS § 378–4 (Supp.1996). As a remedial statute designed to enforce civil rights protections and remedy the effects of discrimination, Chapter 368 should be liberally construed in order to accomplish that purpose. *See, e.g., Flores v. United Air Lines*, 70 Haw. 1, 757 P.2d 641 (1988).

Section 368–17 provides in part:

(a) The remedies ordered by the commission or the court under this chapter *may include compensatory and punitive damages* and legal and equitable relief, including, but not limited to:

...

(8) Payment to the complainant of damages for an injury or loss caused by a violation of ... part I of chapter 378[.]

.....

See also HRS § 368–3(5) (1993) (“The Commission shall have the following powers and functions: ... (5) To order appropriate legal and equitable relief[.]”). The Commission and the courts clearly have the power to award compensatory damages, including damages for emotional distress, pursuant to these statutes. *Id.* At 17-18, 653-654.

Furukawa makes clear that, under H.R.S. § 368-17, the Commission has statutory authority to award compensatory damages, including monetary damages for emotional distress, and punitive damages, in addition to equitable relief.

The record shows that Respondent’s treatment of Complainant Boyd and his actions caused her to feel threatened, scared, ridiculed, hurt and sad. She became “an emotional wreck,” and became suicidal. She was also fearful for her physical safety. Complainant continues to be depressed. The Commission adopts the Hearing Examiner’s award of compensatory damages of

\$75,000.00.

B. Punitive Damages

H.R.S. §368-17(a) also authorizes the Commission to award punitive damages. The Commission is mindful that an award of punitive damages is an extraordinary remedy and is only imposed when “the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime.” *Kekona v. Bornemann*, 135 Haw. 254, 263, 349 P.3d 361, 370 (2015)(citing *Masaki v. Gen. Motors Corp.*, 71 Haw. 1, 6, 780 P.2d 566, 570 (1989)).

Punitive damages are assessed to punish a respondent for aggravated or outrageous misconduct and to deter the respondent and others from similar conduct in the future. *Masaki v. General Motors Corp.*, 71 Haw. 1, 12, (1989). *Santos v. Niimi*, Docket No. 92-001-E-SH (1992). Since its purposes are punishment and deterrence, punitive damages are awarded when a respondent acts wantonly, oppressively or with such malice as implies of spirit of mischief or criminal indifference to civil obligations, or where there has been some willful misconduct or entire want of care which would raise the presumption of a conscious indifference to consequences. *Masaki, supra*, at 13; *Hoshijo/Gould v. Simich et.al.*, Docket No. 95-12-E-SH (1996); The penal character of punitive damages requires a more stringent standard of proof – clear and convincing evidence – than the preponderance of the evidence standard generally employed in administrative hearings. *Id.* at 15-17.

The Commission adopts the hearing examiner’s decision that, under a clear and convincing evidence standard, that Respondent’s harassment of Complainant was intentional, deliberate and malicious, that it was undertaken with a conscious indifference to civil obligations

and consequences, and that, in light of Respondent's threats of violence toward Complainant, Respondent's conduct had the character of outrage frequently associated with crime. In light of these findings, the Commission concludes that \$20,000.00 is an appropriate amount of punitive damages and affirms the Hearings Examiner's recommended order in this regard.

C. Costs and Penalties

The Commission does not uphold the penalty of \$500.00 against Respondent for noncompliance. The Commission agrees that it has the power to impose a penalty. It also notes that Mr. Primack failed to comply with the Hearings Examiner's orders, failed to appear at the hearing on the motions and failed to appear at the contested case hearing on June 27, 2018. However, a penalty will not be imposed. The failure to participate affected the Respondent, more than the Complainant.

D. Equitable Relief

Pursuant to H.R.S. §§368-17 and 515-13, the Commission affirms the Hearings Examiner's recommended order regarding the following equitable relief:

1. Respondent immediately cease and desist from unlawful discriminatory practices on any protected basis in any housing accommodation owned or managed by Respondent in the State of Hawai'i.

2. Respondent immediately develop and implement a written anti-discrimination in real property transactions policy, to be approved by the Executive Director, for any housing accommodation owned or managed by Respondent in the State of Hawai'i, and is ordered to provide a copy of such policy to all applicants and tenants.

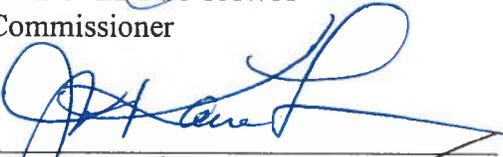
3. Respondent to attend a fair housing training session, on a date to be set in April, 2019.
4. Respondent to bear the costs of publishing the results of this contested case, in a press statement provided by the Executive Director, in at least one newspaper published in the State of Hawai'i and having a general state-wide circulation, not less than once in the Sunday edition and once the following week.

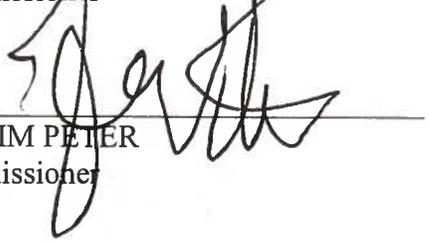
Dated: Honolulu, Hawai'i, November 30, 2018.

HAWAI'I CIVIL RIGHTS COMMISSION


LINDA HAMILTON KRIEGER
Chairperson


LIANN EBESUGAWA
Commissioner


JOAN KAMILA LEWIS
Commissioner


JOAKIM PETER
Commissioner

Copies sent to:

Constance Yonashiro, HCRC Enforcement Attorney
Jeffrey David Primack, Respondent

Notice: Under H.R.S. § 368-16(a), a complainant and respondent have the right to appeal a final order of the Commission by filing an appeal with the circuit court within thirty (30) days of service of a final decision and order of the Commission.

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CIVIL RIGHTS COMMISSION
HONOLULU, HAWAII

HAWAII CIVIL RIGHTS COMMISSION

STATE OF HAWAII

WILLIAM D. HOSHIJO, Executive Director, on behalf of the complaint filed by KIONA E. BOYD,) DOCKET NO. 18-001-H-S
) HEARING EXAMINER'S AMENDED PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND RECOMMENDED ORDER; APPENDIX "A"
vs.)
JEFFREY DAVID PRIMACK,) HEARING DATE: June 27, 2018
Respondent.) HEARINGS EXAMINER: The Honorable Karl K. Sakamoto (ret.)

HEARING EXAMINER'S AMENDED PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND RECOMMENDED ORDER

The Hearing Examiner of the Hawaii Civil Rights Commission, KARL K. SAKAMOTO, hereby submits his Amended Proposed Findings of Fact and Conclusions of Law and Recommended Order for the HAWAII CIVIL RIGHTS COMMISSION's review and consideration. This submission is made pursuant to Hawaii Revised Statutes §§ 368-3 and 368-14, and Hawaii Administrative Rules (hereinafter "HAR") § 12-46-50. These amendments only reflect the addition of Appendix A, and a correction of the caption.

DATED: Honolulu, Hawaii, August 15, 2018.



KARL K. SAKAMOTO
Hearing Examiner

**AMENDED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

I. INTRODUCTION

A contested case hearing was held at the Hawai‘i Civil Rights Commission before Hearings Examiner Karl K. Sakamoto, on June 27, 2018. The procedural history of this case is set forth in the attached Appendix A.

Having heard and considered the evidence adduced during the hearing of this matter and having considered the memoranda and arguments submitted by the parties, the Hearings Examiner now makes the following Findings of Fact and states his Conclusions of Law as follows:

II. FINDINGS OF FACT¹

1. This action has arisen and proceeded under and pursuant to Chapters 515 and 368 of the Hawai‘i Revised Statutes (hereinafter “HRS”) and Title 12, Chapter 46, Subchapter 20 of the Hawai‘i Administrative Rules (hereinafter “HAR”), to remedy discrimination in real estate transactions on the basis of sex, including gender identity and expression.

2. The witnesses’ and Complainant’s testimony provided at the Hearing were credible and persuasive.

3. Complainant KIONA E. BOYD (hereinafter “Complainant”) is, and at all times mentioned herein was, a resident of the County of Hawai‘i, State of Hawai‘i. She is the Complainant on whose behalf this proceeding has been brought by the Executive Director for the Hawai‘i Civil Rights Commission (hereinafter “Executive Director”). (Transcript (hereinafter “Tr.”) at 59, 1; Exhibit (hereinafter “Ex.”) 21).

4. Respondent JEFFREY DAVID PRIMACK (hereinafter “Respondent”) is,

¹ To the extent that the following findings of fact also contain conclusions of law, they shall be deemed incorporated into the conclusions of law.

and at all times mentioned herein was, the owner of 31-1049 Kulike Place, Hakalau, HI 96710 (hereinafter the “subject property”). (Tr. at 3, 20; Ex. 20; Admission (hereinafter “Adm.”) #1).

5. Respondent resides in Florida and occasionally visits the subject property to host retreats for his company, Supreme Science Qigong Foundation, where Respondent is the founder and president. Respondent travels across the Mainland with his instructors to host qigong seminars in various cities that attract anywhere from 400 to 2,200 participants. Respondent’s organization also certifies qigong instructors. Paul and Rebecca Heller, former qigong instructors with Respondent’s company who traveled across the mainland with him, testified that costs related to seminars and certification courses ranged from \$100.00 to \$395.00. Paul and Rebecca Heller testified that when they were instructors, Respondent’s company visited up to 14 cities in a year. Respondent also sells books, CDs, DVDs, and hosts Hawai‘i retreats as a part of his organization. Paul and Rebecca Heller testified that Respondent would charge \$1,500.00 for the Hawai‘i retreats, which was attended by up to 25 people. When visiting the property to host a retreat, Respondent would bring four to six staff members to help prepare for the retreat. (Tr. at 4, 6, 24, 25, 65-69, 89-94; Ex. 20; Adms #6, #25, #26).

6. Complainant has a background in electromechanical engineering and after twenty years working in weapons’ design and military defense, she moved to Hawai‘i in 2011. Complainant began working as a handyman on the Big Island and eventually started working as a caretaker for various properties. (Tr. at 17-18).

7. Respondent and Complainant met in 2012 when Complainant began going to the subject property to complete work on the yurt structure. (Tr. at 20).

8. Several structures exist on the subject property including cabins and a yurt that was built on top of an existing living unit. The upper level of the yurt structure has a bathroom,

kitchen, living area, and a bedroom. There are two entrances to the upper level, the front entrance leads to the top of a hill, while the back entrance leads to a lanai. The lower level has a bedroom and bathroom and has one entrance that leads to an area beneath the deck. There is no interior staircase connecting the two units. (Tr. at 24, 81, 82, 96, 97; Exs. 13, 15, 20).

9. From 2014 to 2015, Respondent provided Complainant housing accommodations in exchange for caretaking duties on the subject property. During this time, Complainant lived in the yurt structure on the subject property. (Tr. at 3, 23-24; Ex. 17; Adm. #2).

10. Some of Complainant's duties as the subject property's caretaker included weed-whacking, land-clearing, and coordinating and working events that were held on the subject property. In addition to providing housing accommodations for Complainant, Respondent paid Complainant at least \$1000 per month for work she performed on the subject property. Respondent would pay her mostly through PayPal, but occasionally would write her a check issued from his company, Supreme Science Qigong, or Big Island Qigong, and by cash if he was on island during a retreat. (Tr. at 3, 20, 21, 29-30, 54; Exs. 10, 11, 17; Adms #3, #4, #7, #8).

11. Respondent also allowed outside groups to use the subject property for camping and educational activities. Greg Seivert, founder of Hawaii Outdoors Institute, testified that he paid Respondent approximately \$10,000 for use of his property during the subject period. Greg Seivert testified that he had never met Respondent in person, but communicated with Respondent through email, and contacted Respondent's secretary to make payments. (Tr. at 54, 80-81).

12. Respondent admitted in the record that Complainant maintained the property adequately in 2014. Paul and Rebecca Heller testified that Complainant cared deeply for

the land. Paul Heller, who visited the property weekly during the subject period, observed that the yurt was always “spotless” and the property “well-maintained” when Complainant lived there. Complainant cleared the overgrown wilderness into “beautiful park-like areas” on the subject property (Tr. at 5, 21, 70-71, 102; Adms #9).

13. Complainant poured her heart into the land and transformed the subject property through her “sweat and tears.” Complainant testified, “I transformed the land, [and] the land gave me the strength to transform my life into where I’m supposed to be.” (Tr. at 21, 58, 63-64; Exs. 13).

14. Prior to Complainant’s transgender transformation, Complainant and Respondent were friends. They had lengthy conversations together, and shared walks. They would laugh and joke, like good friends. (Tr. At 45, 46).

15. On January 1, 2015, Complainant began openly expressing her gender identity as a woman and began using the name Kiona instead of “Kawika” and/or “David.” In addition to changing her name, Complainant began outwardly expressing her gender identity through use of female pronouns and female gender-related terms. (Tr. at 14, 15).

16. Complainant began living as her “true self” in 2015 because she lost a dear friend in 2014, whose passing taught Complainant “how quickly your life can be taken from you,” and because she was going to turn 50 years old that year. (Tr. at 15).

17. Complainant changed her name to Kiona because it better suited her gender than her birth name. Rebecca Stotzer, PhD, Professor at the School of Social Work at the University of Hawai‘i, an expert in bias crimes and discrimination against LGBT individuals, testified many English names are gendered, and a large number of people who transition also choose a new name to better express their gender identity. (Tr. at 14, 111-113, 128).

18. On July 1, 2015, Respondent visited the subject property to host a Qigong retreat for his company. During this visit, Respondent saw, for the first time in person, Complainant expressing her gender identity as a female, by dressing in feminine clothing and wearing makeup. (Tr. at 4, 15, 30; Adms #11).

19. On July 1, 2015, Respondent asked Complainant whether she had surgery related to her gender identity. Respondent waved his hands over the groin area and asked her if she still had her “junk.” Respondent also pointed to her chest and asked her when she had her chest “done.” Respondent also asked Complainant whether she liked women or men. Complainant informed Respondent that she was only interested in women, “seemed to put him [Respondent] at ease.” (Tr. at 5, 31, 32; Adms #19, #20).

20. Due to Complainant’s transgender transformation, Respondent’s and Complainant’s relationship dramatically changed for the worse.

21. Respondent’s inquiries on July 1, 2015 worried her because she had never been asked these questions before. Complainant had lived as a woman for only about six months, and she was concerned for her future because Respondent controlled her work and her living situation. (Tr. at 30, 31).

22. The next morning, on July 2, 2015, Respondent told Complainant to leave the property because he believed his guests for his Qigong retreat would react negatively toward her because of her gender transition. Complainant had to move her clothing and belongings out of the yurt structure and into the garage on the subject property. She left the subject property that evening. (Tr. at 4, 5, 32, 33, 34; Adms #12, #21, #24).

23. Between July 2, 2015 and July 14, 2015, Complainant resided in her car and was unable to find temporary housing because it was the Fourth of July holiday week.

Complainant told Paul Heller that she did not have the money to foot the bill for a hotel out of her own pocket because Respondent did not pay her for work she performed earlier that year. (Tr. at 34-35, 100).

24. Complainant and Respondent communicated between July 2, 2015 and July 14, 2015 through text messages. Complainant informed Respondent about how it was impacting Complainant to be homeless during that time, and she was worried about how she was forced off the property during the period of the Respondent’s qigong retreat. Respondent confirmed that “at the end of the retreat I asked him [Complainant] to leave and said that [s]he could no longer stay at the property.” (Tr. at 34- 35, 100; Ex. 17)

25. Between July 15, 2015 and July 16, 2015, Respondent and Complainant exchanged text messages. Respondent admitted in the record that he wrote the following text messages to Complainant (Tr. at 4, 5, 35-36, 37-37-39, 40, 42-43; Exs. 1, 4, 5, 6, 8; Adms #13, #14, #15, #16):

Ex No.	Date	Description	Doc ID
ED-1	7.15.15 9:38 AM	Text message from Jeffrey David Primack to Kiona E. Boyd: “I feel like Kawika died”	HCRC 0336
ED-4	7.16.15 8:49 AM	Text message from Jeffrey David Primack to Kiona E. Boyd: “I don’t like girls who wear makeup” “Let alone men”	HCRC 0378
ED-5	7.16.15 8:52 AM	Text message from Jeffrey David Primack to Kiona E. Boyd: “I will not be terrorized” “I will inflict pain on you if you confront me” “Best watch your tone”	HCRC 0380
ED-6	7.16.15 8:53 AM	Text message from Jeffrey David Primack to Kiona E. Boyd: “My fist in your face is direct” “I will fight you now” “I’m ready to duke it out”	HCRC 0381
ED-8	7.16.15 8:57 AM	Text message from Jeffrey David Primack to Kiona E. Boyd: “I will strangle you” “you pussy ass bitch”	HCRC 0383

26. Respondent also wrote the following text messages to Complainant on July

16, 2015 (Tr. at 28, 36-37, 41, 42-43, 44; Exs. 2, 3, 7, 8, 9):

No.	Date	Description	DocID
ED-2	7.16.15 8:45 AM	Text message from Jeffrey David Primack to Kiona E. Boyd: “Hey Fuck You”	HCRC 0375
ED-3	7.16.15 8:49 AM	Text message from Jeffrey David Primack to Kiona E. Boyd: “But you arrive smelling like a perfume factory in makeup”	HCRC 0377
ED-7	7.16.15 8:54-8:55 AM	Text message from Jeffrey David Primack to Kiona E. Boyd: “if you see me We will fight now” “You try to claim my land Let’s fight BROTHER”	HCRC 0382
ED-8	7.16.15 8:56 AM	Text message from Jeffrey David Primack to Kiona E. Boyd: “You imagine your [sic] fighting for something for the Trans?”	HCRC 0383
ED-9	7.16.15 9:32 AM	Text message from Jeffrey David Primack to Kiona E. Boyd: “I hope You are happy David Boyd” “That’s what I will call you at the police station” “David Boyd”	HCRC 0394

27. Respondent sent her a “barrage” of text messages—at least a hundred text messages—on July 16, 2015. Respondent would text her so quickly that she struggled to respond. Complainant received these text messages, realizing that she was being kicked off the property permanently and was going to lose her job. (Tr. at 36, 40-41, 45, 74, 98).

28. Professor Stotzer testified about the comprehensive research review by *Hughto, Reisner, and Pachankis (2015)*, which explained that stigma against transgender people comes in many forms, including at the interpersonal level, which includes micro-aggressions, threats, and acts of discrimination. Stigma operated on at least the interpersonal level from the text messages from Respondent sent to Complainant. (Tr. at 126-127).

29. Professor Stotzer testified that in the 2015 U.S. Transgender Survey it was reported that there was a high frequency of violence against transgender people because of their gender identity. Therefore, when a transgender person receives a text such as “My fist in your

face is direct” “I will fight you now” “I’m ready to duke it out,” a transgender person has to assume that the threat is credible. (Tr. at 141, 142)

30. The text messages such as, “But you arrive smelling like a perfume factor in makeup” and “I don’t like girls who wear makeup” “Let alone men,” made to a person who has transitioned, such as Complainant, were not perceived as incidental. The text messages were an assault on a Complainant’s identity, and a critique of her transgender femininity. (Tr. at 133, 134).

31. Paul and Rebecca Heller saw hundreds of text messages exchanged between Respondent and Complainant on Complainant’s phone. Rebecca Heller had a dinner with Complainant where Complainant told her and her husband, Paul, that “Jeff had fired her and kicked her off the property [and] had threatened her. Complainant was very distraught. She looked like she hadn’t slept. She had big circles around her eyes, she’d been crying in bed. Complainant was shaking. Rebecca Heller related that Complainant “showed us a bunch of texts where Jeff actually threatened her physically.” (Tr. 71-74, 98, 99-100)

32. Paul Heller observed Complainant during this conversation as “very upset” and “very distraught” due to Respondent’s termination of Complainant’s employment and eviction from her housing accommodation. Complainant was “...destroyed. I mean, difficult to speak, crying, just very distraught because she didn’t know where she was going to sleep.” (Tr. at 97, 100).

33. Paul Heller was in “disbelief” and was “horrified” after reading the text messages from Respondent and found that Respondent’s use of “aggressive language” in the text messages “was just disgusting.” (Tr. at 99).

34. Rebecca Heller witnessed that during the dinner, Complainant “said she was afraid for her life and we spoke at length what the issue was.” Complainant was extremely fearful

for her life because of Respondent's conduct and text communications. Paul and Rebecca Heller recognized Respondent's phone number on the text messages because Respondent had given that number to each of them because they had been instructors for his organization. (Tr. 72-73, 99).

35. Rebecca Heller viewed some of the text messages and "remember him [Respondent] talking about choking her. I remember him talking about punching her in the face. There was just a lot of hate and violence in the text messages. I was almost physically ill." (Tr. at 72).

36. Paul Heller spoke with Respondent over the phone a day after seeing the text messages on Complainant's phone. Respondent at first told him the property was not as clean as it should have been, but when Heller pressed Respondent on the issue by recalling the yurt always looking "spotless" and "well maintained," Respondent said, "that's not even the reason, I just shouldn't have to deal with that in my personal life." Respondent related that he found transgender individuals "disgusting" and that if his son came out as transgender "I wouldn't have anything to do with him. I wouldn't have a son." On the record, Respondent admitted that he evicted Complainant from the property because of her gender identity and expression. (Tr. at 5, 102-103; Adms #12, #21, #24).

37. During Paul Heller's phone conversation, Respondent "was so shocked by Kiona now being a woman" and that Respondent told him that he "saw her [Complainant] dressed like that, trying to get attention and, you know, I was mad" and wanted her to leave the property. Respondent also showed animus against gay persons, where Respondent commented, "as long as [they're] not gay in front of me." Respondent posted public comments on Facebook about transgender individuals, which contain messages that transgender individuals are suffering from a mental disorder, which Paul Heller found "very condescending and inflammatory towards people

specifically that were transgender.” (Tr. at 4, 5, 101, 102, 103, 106; Ex. 23).

38. Complainant was “very hurt” by Respondent’s text messages where he intentionally mis-gendered her, and felt like Respondent was “making fun” of “my being, living as a female.” Complainant felt Respondent’s text messages were “attacking me personally for choosing to live my true gender.” Respondent admitted in the record that he threatened to physically harm Complainant because she began expressing her gender identity. Complainant was “stressed out” and an “emotional wreck” because of how Respondent fired her and asked her to leave the property. (Tr. at 36, 37, 41, 44, 45; Adm. #23).

39. Complainant felt “threatened at how quickly it [the text messages] turned to violence and anger.” Respondent’s text messages, including, “I will strangle you” and “you pussy ass bitch” hurt and terrified Complainant because Complainant and Respondent had a mutual friend who had passed away the year before, in 2014, by strangulation. Complainant also testified that when she was fourteen, her step-father attempted to strangle her. (Tr. at 39, 43, 44).

40. Respondent had never before made the types of threats found in his text messages towards Complainant, and that she never sent Respondent text messages threatening to physically harm Respondent or to provoke him. Complainant tried to lighten the text message conversation because she did not know how to respond to Respondent’s threats. Complainant’s attempts to calm Respondent did not work. (Tr. at 37, 39, 42)

41. Complainant felt like her life was in danger after receiving the text messages from Respondent. She filed a police report with the Hawai‘i County Police Department. Complainant related that the officers kept referring to her as “he” despite presenting and being dressed completely as a female. Complainant’s case eventually was given to the prosecutor’s office, however, because Respondent did not live on the island, they were not able to properly

serve him the complaint. (Tr. at 48, 50-51; Ex. 16).

42. After receiving these text messages from Respondent, Complainant reached out to crisis centers, suicide hotlines, and friends through social media, and “became more desperate to have somebody to sit and talk to,” and but still felt “all alone.” A crisis worker met with Complainant for three hours, but told Complainant that there was nothing she could do for her unless Complainant said she was going to commit suicide. Complainant also discussed anti-depressant medication with her doctor, however, she was worried that anti-depressants would enhance her risk of suicide. (Tr. at 46, 47, 48, 49-50, 75, 84, 85, 86-87, 107; Ex. 16).

43. In a Facebook post, dated July 16, 2015, Complainant described the situation with Respondent, her “boss and landlord,” and that Complainant felt she was losing her “battle to continue living,” and that she was “ready to end [her] suffering and pain.” (Tr. at 46-47; Ex 16).

44. Paul Heller was very concerned “that she [Complainant] was going to try end her life” and “the one that was most telling and frightening to me was the [Facebook] post where she talked about calling a suicide hotline and that clarified in my mind where her mindset was” because he personally witnessed Complainant’s depressive state. Paul Heller observed that Complainant had withdrawn from friends. (Tr. at 107, 109, 110).

45. Rebecca Heller believes she is intimately familiar with what suicidal people say and how they act, and because Complainant was exhibiting suicidal signs, she and her husband would call Complainant periodically to check up on her. (Tr. at 75-76).

46. Greg Seivert as Director of Hawaii Outdoor Institute rented the subject property on 10-15 occasions. He would communicate with Complainant many times because of their use of the property. He saw “hints of suicide” in Complainant’s text messages after

Complainant left the subject property. As a result, Seivert called a suicide prevention hotline on Complainant's behalf. Greg Seivert never called a suicide prevention hotline before, but felt compelled to do so for Complainant because he was so worried about her emotional state. (Tr. at 84, 85, 86, 87).

47. Greg Seivert saw Complainant after she left Respondent's property and was living out of her car at Honokohau harbor, where Complainant expressed safety concerns living out of her car as a transgender woman and using the public bathrooms. Greg Seivert remembered that "the thing that worried me most [was] that she was nervous about using the bathroom . . . that was the cause of quite a bit of stress . . . because of safety issues. She didn't know which one to use. It could go bad no matter which one she chose to use every single time." (Tr. 86-87).

48. Complainant arranged with Respondent a return to the subject property to get the rest of her belongings during the period of the end of July of 2015 until August 23, 2015, when Respondent had returned to the mainland. Complainant was extremely sad returning to the subject property she loved, and also afraid because she did not know where Respondent was at that time and whether he would follow through on his threats. (Tr. at 52- 53).

49. On August 30, 2015, Respondent arranged a meeting between himself, his secretary, Patricia Pollari, and Complainant to move Complainant off the property. During this meeting, Respondent discussed Complainant's posting of the screenshots of Respondent's text messages to her Facebook page. Complainant had posted Respondent's text message screenshots to Facebook "to let people know that if something happens to me . . . he [Respondent] made these text messages and threatening [] because I didn't feel like the police was going to do anything." After that meeting, Respondent and Complainant signed an agreement wherein Respondent would pay Complainant for past work performed on the property. (Tr. at 52-55, 56; Exs. 17, 19, 24).

50. Complainant could not stop crying, was not eating, and was not sleeping for about a year because Respondent sent her the text messages and asked her to leave the subject property. Complainant attempts to cope with her feelings, but still feels depressed and reclusive to this day. (Tr. at 58, 63; Ex. 16).

51. Complainant tried to look for other housing accommodations, but because she lost the source of income she was earning from Respondent and lost her housing accommodations, she could not find comparable housing. Despite reasonable efforts, Complainant has difficulty finding comparable employment and housing. On the phone she was the “perfect fit” for caretaking positions as a former engineer, but when people saw her in person, they would look at her “up and down from head to toe [and say] ‘oh you’re Kiona?’” and she would never see the property. Respondent likewise acknowledged that Complainant told him that she was “looking for work and [s]he was qualified but when the families met him [her] they didn’t give him [her] the job.” (Tr. 60-61, 62; Ex. 17).

III. CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the Hearings Examiner makes the following Conclusions of Law, which insofar as they may be considered Findings of Fact are also found to be true in all respects.

Hawai‘i Revised Statutes § 515-3 states, in relevant part, that “[t]t is a discriminatory practice for an owner or any other person engaging in a real estate transaction, or for a real estate broker or salesperson, because of race, sex, including gender identity or expression . . . (1) To refuse to engage in a real estate transaction with a person[.]” Hawai‘i Administrative Rules § 12-46-305(1) similarly states that it is a discriminatory practice for an owner or any other person engaging in a real estate transaction “to refuse to engage in a real estate transaction, evict, or

terminate a tenancy” because of an individual’s protected basis.

Hawai‘i Revised Statutes § 515-16(3), (6), (7) states in relevant part that it is a discriminatory practice for a person:

(3) To interfere with any person in the exercise or enjoyment of any right granted or protected by this chapter . . .;

(6) To threaten, intimidate or interfere with persons in their enjoyment of a housing accommodation because of the race, sex, including gender identity or expression . . .;

(7) To print, circulate, post, or mail, or cause to be published a statement, advertisement, or sign, or to use a form of application for a real estate transaction, or to make a record or inquiry in connection with a prospective real estate transaction, that indicates, directly or indirectly, an intent to make a limitation or specification, or to discriminate because of race, sex, including gender identity or expression. . .

Hawai‘i Administrative Rules § 12-46-310(6) states in relevant part that it is a discriminatory practice for a person to “threaten, intimidate, or interfere with persons in their enjoyment of a housing accommodation . . . because of the person’s protected basis.”

A. JURISDICTION

Pursuant to HRS § 515-9, the Hawai‘i Civil Rights Commission has jurisdiction over the subject of real property transaction practices and discrimination made unlawful by Hawai‘i Revised Statutes Chapter 515.

Section 12-46-302 of the Hawai‘i Administrative Rules defines “real estate transaction” to include, “[t]he advertising, sale, exchange, rental, lease, management, or use of real property, including, but not limited to, any actions related to real property after the advertising, sale, exchange, rental, or lease; the cancellation or termination of a sale, exchange, rental or lease of real property . . .” Under that same section of the administrative rules, “housing accommodation” is defined to include, “any improved or unimproved real property, or part thereof, which is used

or occupied, or is intended, arranged, or designed to be occupied, as the home or residence of one or more individuals . . . “

Pursuant to the above, Respondent Jeffrey David Primack is a “person” engaging in a real estate transaction within the meaning of HRS § 515-2 and HAR § 12-46-302 when, as owner of the subject property, he arranged and intended the yurt structure on the subject property to be the housing accommodation for Complainant Kiona E. Boyd as the caretaker of the subject property.

B. DISCRIMINATION ON THE BASIS OF SEX, INCLUDING GENDER IDENTITY AND EXPRESSION

In 1992, Hawai‘i Revised Statutes Chapter 515 was amended to conform to Title VIII of the federal Civil Rights Act of 1968, as amended by the Fair Housing Amendments of 1988. In 1993, the Commission promulgated HAR § 12-46 subchapter 20 to further conform to Title VIII. In 2005, the State Legislature amended Chapter 515 of the Hawai‘i Revised Statutes to prohibit discriminatory practices on the basis of “. . . sex, including gender identity or expression . . .” and defined “Gender Identity or Expression” in HRS § 515-2 as:

A person’s actual or perceived gender, as well as a person’s gender identity, gender-related self-image, gender-related appearance, or gender-related expression, regardless of whether that gender identity, gender-related self-image, gender-related appearance, or gender-related expression is different from that traditionally associated with the person’s sex at birth.

Hawaii’s fair housing laws, found in HRS § 515 and HAR § 12-46-301 *et seq.*, are substantially equivalent to the federal fair housing laws, and therefore, federal case law and HUD administrative decisions are helpful in formulating the elements of housing discrimination.²

Respondent violated HRS § 515-3(1) and HAR § 12-46-305(1) when Respondent asked

² See Hoshijo, on behalf of Ramos v. Beretania Hale, Ltd., et al, Dkt. No. 99-001-H-D (HCRC 1999) (Findings of Fact and Conclusions of law at p. 17: Additionally, “courts and this Commission may look to employment [discrimination] cases for guidance.”). See also The Sec. of U.S. Dept. of HUD, on Behalf of Lisa M. Soliz, Charging Party, Fair Housing - Fair Lending (P-H) P 25,019 (Dec. 9, 1991) 1991 WL 442790.

Complainant to leave the subject property because of her gender identity and expression. Respondent violated HRS § 515-16(3), (6), (7), and HAR § 12-46-310(6) when Respondent made statements that indicated an intent to discriminate against Complainant because of her gender identity and expression. Respondent threatened, intimidated, and interfered with Complainant's housing accommodation because of her gender identity and expression, and when Respondent created a hostile housing environment because of Complainant's gender identity and expression.

C. DIRECT EVIDENCE OF DISCRIMINATORY INTENT.

The Executive Director presented direct evidence of Respondent Primack's discriminatory intent towards Complainant in the form of numerous text messages from Respondent to Complainant, discriminatory statements by Respondent, and testimony that Respondent admitted his discriminatory intent.

1. Discriminatory Statements.

The record in this matter is replete with written statements and admissions by Respondent of his discriminatory animus towards Complainant Boyd due to her gender identity and expression. (Tr. at 4, 5; Exs. 1-10, 17, 23; Adms #1-26). Discriminatory statements regarding a complainant's protected basis constitute direct evidence of discriminatory animus.³

HRS § 515-16(7) prohibits discriminatory statements in all real estate transactions. This prohibition applies to all properties, even properties otherwise exempted by HRS § 515-4. Verbal statements and electronic messages exchanged between parties engaging in a real estate transaction are considered "statements" under the federal fair housing laws prohibiting discriminatory

³ Id. See also, Brewer v. Muscle Shoals Board of Education, 779 F.2d 631 (11th Cir. 1986); Wilson v. City of Aliceville, 779 F.2d 631 (11th Cir. 1986); Estes v. Dick Smith Ford Inc., 856 F.2d 1097 (8th Cir. 1988); Taylor v. Jones, 653 F.2d 1193 (8th Cir. 1980).

statements.⁴ The standard for analysis is whether an ordinary listener would find that Respondent's statements and text messages indicate a preference, limitation, or intent to discriminate against Complainant's protected class.⁵

When Respondent arrived on the subject property on July 1, 2015, he immediately began making statements and inquiries regarding Complainant's protected basis including questions about whether she had surgery to remove her birth reproductive organs, and whether she had breast augmentation. Respondent asked Complainant whether she was attracted to the male or female sex. Were it not for Complainant's recent outward expression of that gender identity, Respondent would not have asked her these invasive and personal questions upon arriving on the subject property on July 1, 2015.

Additionally, over a short period of time, Respondent sent numerous derogatory, hateful, and harassing text messages to Complainant discussing her gender identity and expression. In Smith v. MTL,⁶ the hearings examiner for the Hawaii Civil Rights Commission followed the Eleventh Circuit in reasoning that comments made by the decision maker at or near the time of an adverse action can constitute direct evidence of intent to discriminate.⁷ In the instant case, during the same period of time that Respondent harassed and evicted Complainant, Respondent Primack sent Complainant Boyd numerous text messages involving hateful and threatening statements toward Complainant involving her gender identity and expression. From July 15, 2015 to July 16, 2015,

⁴ Id. See also Smith v. Avanti, 2017 WL 1284723 (D. Colo. Apr. 5, 2017) (emails were "statements" covered by the federal Fair Housing Act).

⁵ Maziarz v. Hous. Auth. of the Town of Vernon, 281 F.R.D. 71, 78 (D. Conn. 2012).

⁶ Smith v. MTL, Inc., H.C.R.C. No. 92-003-PA-R-S, at 27 (Hearing's Exam Recomm. Order) (Haw. 1992).

⁷ Ibid. Citing to Jones v. City of Boston, 738 F.Supp 604, 605-606 (D.Mass. 1990); Miles v. M.N.C. Corp., 750 F.2d 867, 36 EPD 34,953 at 36,267-36,270 (11th Cir. 1985); EEOC v. Alton Packaging Corp., 901 F.2d 920, 53 EPD 39,932 at 62,558 (11th Cir. 1990); Senello v. Reserve Life Insurance Co., 872 F.2d 393, 50 EPD 38,977 at 57,228 (11th Cir. 1989).

Respondent's text messages to Complainant included:

- "I feel like Kawika died"
- "But you arrive smelling like a perfume factory in makeup"
- "I don't like girls who wear makeup" "Let alone men"
- "Let's fight BROTHER" [emphasis in original]
- "You imagine your [sic] fighting for something for the Trans?"
- "I hope You are happy David Boyd" "That's what I will call you at the police station" "David Boyd"

Respondent's text messages regarding Complainant's perfume and makeup use was a negative gender-based stereotype aimed specifically to hurt Complainant based on her expression of her gender identity. Furthermore, Respondent's text message, "let alone men," directly rejects Complainant's gender identity. This denial of Complainant's gender identity and Respondent's repeated and purposeful mis-gendering of Complainant is further shown in the text messages where Respondent calls Complainant, "BROTHER" with emphasis, and "David Boyd" after Complainant had informed Respondent of her gender identity as a woman. Respondent's comment that he felt "like Kawika died" related to Complainant's decision to live openly as Kiona, and Complainant testified that Respondent did not understand that she was the same person, she just expressed herself differently.

Finally, Respondent's text message that Complainant was fighting for "the Trans" isolated Complainant's protected class and was a negative comment on that protected class. Respondent's invasive and personal questions to Complainant about her protected class and Respondent's text messages to Complainant clearly reflect a discriminatory attitude toward Complainant based on her protected class.⁸

⁸ There is no dispute by the parties that Complainant is a member of a protected class. Complainant testified that she began expressing her gender identity full-time on January 1, 2015 and changed her name from David and Kawika to Kiona as an expression of her gender identity. Complainant also testified that she began using female pronouns and female gender-related terms, and began expressing her gender identity through dress and appearance.

2. Interference, Threats, and Intimidation.

Respondent interfered with Complainant's enjoyment of her housing accommodation by deliberately refusing to use her preferred gender terms and names, making stereotyped comments about the expression of her gender identity, and by subjecting Complainant to invasive and personal questions regarding her gender identity. *See supra.*

Respondent sent Complainant intimidating and threatening text messages, that included, but is not limited to:

- "My fist in your face is direct"
- "I will fight you now"
- "I'm ready to duke it out"
- "I will strangle you"
- "You pussy ass bitch"
- "Hey Fuck You"
- "I will inflict pain on you if you confront me"

Complainant testified that Respondent's threats of physical violence terrified her because they occurred soon after Respondent first saw Complainant openly expressing her gender identity in person. The expert witness testified that comprehensive research has shown that transgender individuals have a high risk of being victims of violence and murder and that transgender individuals, therefore, take threats of violence seriously. (Tr. at 140, 141). Respondent's threats via text messages are examples of verbal violence, which transgender individuals experience at a disproportionate rates than other individuals who are not transgender.

Finally, considering the totality of the circumstances, the threats of violence were made during the same text message conversation, and at times within the same minute, on July 16, 2015, where Respondent repeatedly and purposely mis-gendered Complainant or isolated Complainant's protected class, indicating that the threats of violence and Complainant's gender identity were connected. Respondent's adverse communications to Complainant interfered, threatened, and

intimidated Complainant's use and enjoyment of her housing accommodation.

3. Refusal to Engage in a Real Estate Transaction/Eviction.⁹

The Commission has recognized that protected basis insult made at or near the time of an adverse action can constitute direct evidence of intent to discriminate.¹⁰ Stereotyped remarks about males or females in a real estate transaction can be evidence that gender played a part in the transactional decision.¹¹

In this case, there is temporal proximity, and throughout the text message conversations, wherein Respondent negatively comments about Complainant's gender identity and expression. Respondent referenced Complainant's living situation and told her that "[y]ou have chosen a path I can't walk with you on," "it's time to go apart," and "why can't you leave???" Complainant testified that when Respondent began sending her these text messages described above, she realized she was being kicked off the property and that she was going to lose her housing accommodation. Respondent's stereotyped remarks are evidence that Complainant's gender played a significant part in Respondent Primack's adverse transactional conduct.

On the morning of July 16, 2015, Respondent sent Complainant hundreds of text messages in an effort to get her to leave the property, and the evidence shows that Respondent's statements about Complainant's housing accommodation often came within minutes of a negative comment on her gender identity. Respondent admitted on the record and to Paul Heller that he asked Complainant to leave the property because of her gender identity and expression.

⁹ Under the plain reading of the HAR § 12-46-305(1), refusal to engage in a real estate transaction includes the decision to "terminate a tenancy" and is not limited to prospective tenants.

¹⁰ Smith vs. MTL Inc. et al, Docket No. 92-003-PA-R-S; *Hearing Examiner's Findings of Fact, Conclusions of Law and Recommended Order* at 27 (1993).

¹¹ The Sec. of U.S. Dept. of HUD, on behalf of Lisa M. Soliz, Charging Party, Fair Housing – Fair Lending (P-H) P 25,019 (Dec. 9, 1991) 1991 WL 442790 (quoting Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)).

Furthermore, not only does this case present direct evidence through text messages, statements, and admissions, that Respondent was motivated to terminate Complainant's tenancy because of her gender identity and expression, the timing of Respondent's decision to terminate Complainant's tenancy after he saw Complainant expressing her gender identity in person for the first time further demonstrates that Complainant's protected class was a motivating factor in Respondent's adverse decision. Respondent arrived on the subject property on July 1, 2015, and the next day, Respondent asked Complainant to leave the property during his Qigong retreat. Two weeks later, on July 16, 2015, Respondent asked Complainant to vacate the property for good. This proximity of time indicates that seeing Complainant expressing her gender identity in person was a motivating factor in Respondent's decision to terminate Complainant's tenancy.

Respondent's assertion that his adverse conduct was due to Complainant's false identity and failure to maintain the premises was pretextual and unsupported. In multiple pleadings, Respondent has alleged that he asked Complainant to leave her housing accommodation because she did not "give any indication future events would result in her becoming 'Kiona Boyd,'" arguing that Complainant's change of name was a falsification of identity.¹² The name Complainant chose to refer to herself as in 2015 was clearly an expression of her gender identity. Respondent rejected Complainant's transgender transformation, in both physical form and identity. Witnesses that were familiar with the property also rejected the notion that the premises were not maintained.

Finally, the record contains testimony that Respondent Primack admitted to at least one of the witnesses that Complainant's gender transition was the true reason for his adverse actions against Complainant. Paul Heller testified that Respondent told him that transgender individuals are "disgusting" and admitted that he fired Complainant because she was transgender. (Tr. at 102; Adm.

¹² See Respondent's Motion to Dismiss, filed April 9, 2018, unnumbered pages 3-4 ([i]n whole and/or in part the Complainant was asked to vacate housing accommodations due to falsification of identity" *id.* at 4).

#22). The nature and extent of Respondent's adverse communications after discovering Complainant's transgender transformation additionally reflects the motivating force for Respondent's swift adverse action was Complainant's transgender identity.

4. Hostile Environment Harassment.

Complainant has demonstrated that she has been subjected to unlawful discriminatory hostile housing environment harassment. The Executive Director has presented direct evidence of Respondent's discriminatory intent against Complainant due to her gender identity.¹³

A housing provider's actions creates a hostile housing environment that violates the state's fair housing laws when Complainant shows that:

(1) Complainant was subjected to verbal, visual, or physical conduct relating to complainant's protected class; (2) the conduct was unwelcomed; (3) the conduct was severe or pervasive; (4) the conduct had the purpose or effect of a) unreasonably interfering with the complainant's use and enjoyment of the premise, or b) creating an intimidating, hostile or offensive environment; (5) the complainant actually perceived the conduct as having such a purpose or effect; and (6) complainant's perception was objectively reasonable to a person of the complainant's gender in the same position as the complainant.¹⁴

Here, Respondent engaged in verbal and visual conduct—through statements and text messages—that negatively commented and threatened Complainant with physical harm or death due to Complainant's gender identity. These statements were unwelcomed by Complainant. Complainant attempted to calm Respondent down, and that she never instigated or provoked the threats of verbal violence by Respondent. No justifiable reason exists for Respondent's adverse

¹³ Masami "Sparky" Niimi vs. Hawaii Civil Rights Commission, Civil No. 93-88, *Final Order Affirming Agency Decision* (08.31.94); Dolores Santos v. Hawaiian Flower Exports, Inc and Masami "Sparky" Niimi, Docket No. 92-001 E-SH. See also, White v. U.S. Dept. of HUD, 475 F.3d 898, 904 (7th Cir. 2007).

¹⁴ William D. Hoshijo, on behalf of the complaint filed by Elaine M. Bowes v. Michael Kakar, Dkt. No. 09-001-H-SH (HCRC 2010) (Hearing's Examiner's Findings of Fact and Conclusions of Law) (quoting Arquero v. Hilton Hawai'ian Village, LLC, 91 P.3d 505, 512-13 (Haw. 2004). See also DiCenso v. Cisneros, 96 F.3d 1004, 1007 (7th Cir. 1996) ("a determination of what constitutes a hostile environment in the housing context requires the same analysis courts have undertaken in the Title VII context.").

communications and threats towards Complainant.

Complainant and other witnesses knew that Respondent sent hundreds of text messages to Complainant in July 2015, demonstrating that Respondent's conduct was pervasive. The repeated adverse communications compounded the impact against Complainant. Additionally, Respondent called Complainant a "pussy ass bitch" and threatened to strangle her. Respondent's threats of physical harm and death are severe incidents of harassment. Cumulatively, the extreme nature and extent of the harassment severely harmed Complainant.

The effect and Complainant's perceptions of Respondent's verbal and visual conduct created a hostile housing environment. Complainant filed a police report against Respondent with the Hawai'i County Police Department and reached out to crisis centers and friends. Finally, Respondent's threats to punch, inflict pain, and strangle Complainant would cause a reasonable transgender woman in the same position as Complainant to perceive her housing environment to be hostile because of Respondent's conduct.¹⁵ Transgender individuals have a heightened risk of being subjected to violence, and Complainant's fears were objectively and subjectively valid. Based on the totality of circumstances, Respondent created a hostile housing environment for Complainant because of her gender identity and expression.

The Executive Director has presented direct evidence that Respondent's unlawful discriminatory intent motivated the actions in this matter, the outcome in this matter is guided by a 2007 Commission decision involving direct evidence of unlawful discrimination under HRS Chapter 515:

If the Executive Director presents direct evidence of discriminatory intent, the burden of proof shifts to the respondent to either: a) rebut such evidence by proving that it is not true; 2) establish an affirmative defense; or 3) limit, but not

¹⁵ See Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991) (adopting a "reasonable woman" standard, finding that reasonableness is not gender-blind).

avoid liability by showing mixed motives for the adverse action (i.e., showing both legitimate and illegitimate considerations behind the action).¹⁶

Under HRS Chapter 515 when the Complainant has demonstrated that discriminatory intent was any factor in the real estate transaction, causation has been established. HAR § 12-46-317 states:

Causation standard. In determining whether a discriminatory practice constituting disparate treatment has been committed under this subchapter, it must be shown by a preponderance of the evidence: (1) That a causal connection existed between a person's protected basis and the alleged discriminatory conduct; and (2) That the protected basis was *any part* of the reason for the conduct. [emphasis added]¹⁷

The numerous documents, statements, and admissions discussed above all constitute direct evidence of Respondent's discriminatory intent towards Complainant on the basis of Complainant's gender identity and expression. Complainant has fully established a prima facie case of unlawful discrimination under HRS Chapter 515.

The burden of proof has shifted to the Respondent to either: a) rebut the direct evidence by proving that it is not true; 2) establish an affirmative defense; or 3) limit, but not avoid liability by showing mixed motives for the adverse action (i.e., showing both legitimate and illegitimate considerations behind the action).

¹⁶ Del M. Scotto v. Janene Caracus, *Hearings Examiner's Findings of Fact, Conclusions of Law and Recommended Order*, Docket No. 06-001-H-D (03.13.07); *citing*, Shirley Mae Smith on behalf of herself and Jonathan Betts, her minor son vs. MTL Inc.; Oahu Transportation Services; Department of Transportation Services, City and County of Honolulu; Honolulu Rapid transit Authority, City and County of Honolulu, Docket No. 92-003-PA-R-S; *Hearing Examiner's Findings of Fact, Conclusions of Law and Recommended Order* (07.23.93); Schwemm, § 10.3; Shoppe v. Gucci America Inc., 94 Hawai'i 368, 14 P.3d 1049, 1059 (2000).

¹⁷ In housing discrimination cases, "direct evidence is evidence of conduct or statements that may be viewed as directly reflecting the alleged discriminatory attitude sufficient to permit the fact finder to infer that the discriminatory attitude was more likely than not a motivating factor in the decision." Elliott v. QF Circa 37, LLC, 2018 WL 2933467, at *15 (S.D. Cal. June 12, 2018) (internal citations omitted).

Respondent's purported defense that because Complainant did not initially inform him of her gender identity and/or expression, Complainant had allegedly "falsified her identity" is pretextual. Respondent's adverse conduct was motivated by animosity towards Complainant's gender identity and transgender transformation. A housing provider cannot discriminate against an individual because the individual did not disclose his or her protected class during the initial contact.¹⁸ Openly using a name consistent with one's transgender transformation is not a legitimate basis for adverse action by Respondent. Allowing inquiries into an individual's protected class, or requiring that individuals disclose their protected classes, would grant housing providers the opportunity to illegally consider the individual's protected class in real estate transactions. Here, Complainant was under no obligation to disclose her gender identity to Respondent when Respondent agreed to have Complainant maintain his property in exchange for her housing accommodations, just as Complainant had no obligation to inform Respondent of her sexual orientation, race, religion, or any other protected category.

Respondent's assertion that he asked Complainant to leave the property because Complainant failed to maintain the subject property is pretextual. The record demonstrates no evidence that Respondent was in fact motivated by any legitimate reason, nor does the record present evidence in support of Respondent's allegations that Complainant was not adequately maintaining the property. Paul Heller credibly testified that when he pressed Respondent for the actual reason he evicted Complainant, Respondent stated it was because "I came to my property and, you know saw her dressed like that. Trying to get attention" and Respondent said he did not want to "deal with that in my personal life . . . that type of person is disgusting." (Tr. at 102). Paul

¹⁸ See Teague v. Tseu, 971 P.2d 1104 (Haw. 1999), the Hawai'i Supreme Court rejected an argument by an employer that the employer had a legitimate reason to fire the complainant because the employer believed the complainant lied when she did not disclose her pregnancy when she accepted a position with the employer.

Heller also observed the subject property to be properly maintained.

Respondent's assertions do not address the extreme nature and extent of violent and gender-oriented text and communications. No legitimate reason exists or supports Respondent's negative communications to Complainant. Respondent's communications are prime examples of bias due to Complainant's gender identity and expression. The dramatic decline of Complainant's and Respondent's friendship after Respondent discovered Complainant's transgender transformation clearly identifies Respondent's motivating force.

D. LIABILITY

Under HRS § 515 and HAR § 12-46 Subchapter 20, it is unlawful to discriminate against an individual because of a person's sex, including gender identity and expression. The overwhelming evidence in this case shows that Complainant was the victim of discrimination based on her gender identity and expression when Respondent refused to engage in a real estate transaction with Complainant, when Respondent subjected Complainant to discriminatory statements, when Respondent threatened, intimidated, and interfered with Complainant's housing accommodation, and when Respondent created a hostile housing environment, in violation of HRS §§ 515-3(1), 515-16(3), 515-16(6), 515-16(7) and HAR §§ 12-46-305(1), and 12-46-310(6).

E. REMEDIES

Both compensatory and punitive damages are authorized by law under HRS § 368-17.

1. Compensatory Damages

Pursuant to HRS §§ 368-3(5), 368-17(8), and 515-13(b)(7), the Commission has the authority to award damages for an injury caused by the discriminatory practice. Complainant suffers extreme emotional distress because of Respondent's unlawful discriminatory conduct. Complainant became depressed, could not stop crying, could not sleep, could not eat, and

contemplated suicide during the months and years after she was forced off the subject property.

Complainant's devastated emotional state was witnessed by Greg Seivert, and Paul and Rebecca Heller. The impact upon Complainant was so severe that they were extremely concerned for Complainant's emotional well-being and described her as being devastated, depressed, and withdrawn, to the extent they were of the belief Complainant would try to end her life. Complainant reached out to crisis centers, the police, and other sources of assistance during this time but believed no one could help her.

Complainant looked for other housing accommodations after leaving the subject property, but could not find comparable housing due to her lack of income, and Complainant testified that she faced additional discrimination as a transgender woman because her voice over the phone did not match her gender identity in person. Complainant was forced to be homeless, living out of her car after leaving the subject property. She faced additional fears as a homeless transgender woman when using public bathrooms and living at the beachside in a car. Complainant's reaction to Respondent's actions are consistent with the *Reisner* and *Nuttbrock* studies that show the negative mental health consequences of experiencing biased-motivated prejudicial behaviors. (Tr. at 143, 144).

An award of \$75,000.00 for Complainant's emotional distress is deemed appropriate.

2. Punitive Damages

In addition to compensatory damages, punitive damages may be assessed to punish a respondent for egregious and outrageous conduct, and to deter the respondent and others from engaging in similar conduct in the future. The Executive Director must present clear and convincing evidence to show that Respondent acted wantonly or with malice that implies a spirit

of mischief, or criminal indifference to civil obligations, that would raise the presumption of conscious indifference to consequences.¹⁹

The threatening text messages from Respondent show clear and convincing evidence that Respondent acted with malice toward Complainant because of her gender identity and expression. Further, in Exhibit 10, Respondent acts with conscious indifference to the consequences that could result when Respondent identifies that Complainant was never “hired” and had “free rent” and thus, Complainant could not bring an employment or housing discrimination claim against him.

Therefore, it is recommended that Respondent pay punitive damages in the amount of \$20,000.00 to serve as a deterrent to Respondent and others to not engage in these types of unlawful behavior. Respondent has the ability to pay this amount in punitive damages. Respondent owns at least two properties, the subject property in Hakalau, and a property in Florida, and owns at least one business, Supreme Science Qigong, which travels across the Mainland hosting seminars, certifying instructors, and selling Respondent’s books, DVDs, and CD materials. As a result, \$20,000.00 in punitive damages is appropriate.

3. Penalties²⁰

Under HRS § 368-5:

Whoever intentionally resists, prevents, impedes, or interferes with the commission or any of its authorized agents or representatives in the performance of duties pursuant to this chapter, or who in any manner intentionally violates an order of the commission, shall be fined not more than \$500, or imprisoned for not more than ninety days.

In this case, the Hearings Examiner was appointed by the Commission and serves as its

¹⁹ Hoshijo, on behalf of Bowes v. Kakar, Dkt No. 09-001-H-SH (HCRC 2010). See also Gould v. Dr. Robert Simich, et al., Dkt. No. 95-12-E-SH (HCRC 1996);

²⁰ Id.

authorized agent. Respondent failed to comply with multiple orders issued by the Hearings Examiner, failed to appear at the hearing on the motions, and failed to appear for the contested case hearing on June 27, 2018. Therefore, it is recommended that Respondent be assessed a \$500.00 penalty for his noncompliance.

4. Declaratory and Equitable Relief

The Executive Director requests that the Commission order Respondent to:

1. Immediately cease and desist from unlawful discriminatory practices on any protected basis, including sex, which includes gender identity and expression, in any housing accommodation owned by Respondent;
2. Immediately develop and implement a written anti-discrimination in real property transaction policy and procedures, not limited to sex, including gender identity and expression;
3. Attend a fair housing training session, held jointly by the Hawai'i Civil Rights Commission, Legal Aid Society of Hawai'i, and the U. S. Department of Housing and Urban Development, on November 1, 2018;
4. Publish the results of the Commission's contested case hearing in a press release provided by the Commission in at least one newspaper published in the state of Hawai'i and having general state-wide circulation, in such manner, and for such time, as the Commission may order.

F. RECOMMENDED ORDER

Based on the matters set forth above, I recommend that the Commission find and conclude that Respondent Jeffrey David Primack violated HRS §§ 515-3(1), 515-16(3), 515-16(6), 515-16(7) and HAR §§ 12-46-305(1), and 12-46-310(6).

For the violations found above, I recommend that pursuant to HRS § 368-17, the Commission should order:

1. Respondent to pay to Complainant \$75,000.00 as damages in compensation for her emotional injuries caused by Respondent's unlawful discriminatory actions towards

her in a real estate transaction because of her gender identity and expression;

2. Respondent to pay to Complainant \$20,000.00 as punitive damages;
 3. Respondent to pay \$500.00 in penalties for Respondent's failure to comply with the hearings examiner's orders;
 4. Respondent to immediately cease and desist from unlawful discriminatory practices on any protected basis, including sex, which includes gender identity and expression, in any housing accommodation owned by Respondent;
 5. Respondent to immediately develop and implement a written anti-discrimination in real property transaction policy and procedures, prohibiting discrimination against all protected classes, not limited to sex, including gender identity and expression;
 6. Respondent to attend a fair housing training session, held jointly by the Hawai'i Civil Rights Commission, Legal Aid Society of Hawai'i, and the U. S. Department of Housing and Urban Development, on November 1, 2018;
 7. Respondent to publish the results of the Commission's contested case hearing in a press release provided by the Commission in at least one newspaper published in the state of Hawai'i and having general state-wide circulation, in such manner, and for such time, as the Commission may order.
- ..

DATED: Honolulu, Hawaii, August 15, 2018.



Karl K Sakamoto
Hearings Examiner

Copies provided to: Jeffrey David Primack (by certified mail)
Constance Yonashiro (by hand delivery)

APPENDIX A

On December 29, 2015, Complainant Kiona E. Boyd (“Complainant”) filed with the Commission a complaint in writing against Respondent Jeffrey David Primack (“Respondent”) alleging housing discrimination on the basis of her sex, including her gender identity and expression.

The Hawai‘i Civil Rights Commission (“HCRC”), through its Enforcement Section, conducted an investigation pursuant to HRS §§ 368-3(1), 368-13, and 515-9(a) (1). On January 19, 2016, the mailed complaint of housing discrimination sent to Respondent was returned to the Commission marked “Return to Sender—Not Deliverable as Addressed—Insufficient Address.” On September 14, 2016, the HCRC investigator contacted Respondent via telephone and Respondent stated he will accept service and provided his work address for proper service. On September 19, 2016, the HCRC re-sent the complaint to Respondent using his work address. In a letter dated October 11, 2016, Respondent provided a written response to the filed complaint.

The investigation could not be completed within one-hundred and eighty days (180) days from the date of filing, therefore, the Commission granted extensions to investigate the complaint pursuant to HAR § 12-46-12(f) and HRS § 368-13(b). Extensions were granted through May 2017. On May 22, 2017, the Executive Director issued a finding of reasonable cause to believe that discrimination in real property occurred.

The complaint was docketed for hearing on January 24, 2018, and the Hearings Examiner issued a Notice of Docketing of Complaint on February 1, 2018. The Executive Director filed its Scheduling Conference Statement on February 9, 2018, and Respondent filed his Scheduling Conference Statement on February 16, 2018. On February 20, 2018, Respondent filed a motion to appear by telephone to the scheduling conference, and on February 22, 2018, the Hearings

Examiner granted Respondent's motion. The Scheduling Conference was held on February 23, 2018 and a Scheduling Conference Order was issued that same day. On March 5, 2018, Respondent filed a list of mediation centers.

The Executive Director made several discovery requests on March 6, 2018, March 15, 2018, and April 4, 2018, respectively, including the Executive Director's First Request for Production of Documents and Written Answers to Interrogatories; Executive Director's First Request for Admissions; and the Executive Director's Request for Inspection of Land or Premises. There was no response from the Respondent to these discovery requests. On April 3, 2018, the Executive Director filed the name of his expert witness and her expert report.

On April 9, 2018, Respondent filed a Motion to Dismiss Complaint Filed by Kiona E. Boyd, Complainant vs. Jeffrey David Primack, Respondent. Also on April 9, 2018, the settlement conference judge, Leslie Hayashi, ordered a settlement conference to be held on May 1, 2018. On April 16, 2018, the Executive Director filed an *ex-parte* motion to continue the settlement conference. Settlement Conference Judge Hayashi amended her order on May 3, 2018, and set a new settlement conference date of May 22, 2018.

On April 17, 2018, the Executive Director filed a Memorandum in Opposition to Respondent's Motion to Dismiss. Also on April 17, 2018, the Executive Director filed a Motion to Compel Discovery. On April 19, 2018, the Hearings Examiner issued an order for a hearing on Respondent's Motion to Dismiss and the Executive Director's Motion to Compel Discovery to be held on May 9, 2018.

On May 4, 2018, Respondent filed a Motion for Continuance of the Hearing on Motions May 9, 2018. On May 7, 2018, the Executive Director filed a Memorandum of Partial Objection to Respondent's Motion for Continuance. On May 8, 2018, the Hearings Examiner issued an

order Granting in Part and Denying in Part Respondent's Motion for Continuance of Hearing on Motions Set for May 9, 2018.

On May 9, 2018, a hearing was held on the Executive Director's Motion to Compel Discovery, and on that same day, the Hearings Examiner issued an order compelling Respondent to produce the documents in the Executive Director's First Request for Production of Documents and Written Answers to Interrogatories by May 16, 2018, and to allow HCRC personnel to inspect his property on May 11, 2018.

Also on May 9, 2018, the Hearings Examiner amended his order Granting in Part and Denying in Part Respondent's Motion for Continuance of Hearing Set for May 9, 2018. On May 16, 2018, the Executive Director filed a Supplement to the Executive Director's Memorandum in Opposition to Respondent's Motion to Dismiss. On May 17, 2018, the Executive Director filed a Supplement to the Naming of the Executive Director's Expert Witness. On May 18, 2018, the Executive Director filed a Motion to Have Admission be Deemed Admitted. On May 23, 2018, the Executive Director filed his witness list, pursuant to Hearings Examiner's February 23, 2018 Scheduling Conference Order. Respondent did not file a witness list.

On May 30, 2018, the Executive Director filed a Motion for Summary Judgment. Also on May 30, 2018, the Executive Director filed a Motion for Sanctions against Respondent. Respondent did not file any objection or response to any motion filed by the Executive Director.

On June 22, 2018, a hearing on the motions was held before the Hearings Examiner. Respondent did not enter an appearance and an attempt to contact him by telephone was unsuccessful. Also on June 22, 2018, the pre-hearing conference was held and the Executive Director exchanged his contested case exhibits with the hearings examiner and Respondent, via email, because of Respondent's absence.

On June 25, 2018, the Hearings Examiner issued four orders: order granting the Executive Director's motion that the matters in the Executive Director's request for admissions be deemed admitted; order partially granting the Executive Director's motion for sanctions against Respondent; order denying Respondent's motion to dismiss; and order denying Respondent's requests received via electronic mail.

On June 27, 2018, the Executive Director's Motion for Summary Judgment was denied. Pursuant to HRS Chapters 91 and 368, the contested case hearing on this matter was held on June 27, 2018. On the morning of June 27, 2018, Respondent attempted to call the HCRC to attend the hearing telephonically, however, this request had been denied in the Hearings Examiner's June 25, 2018 order.